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### No. 50113-9-II

# COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

MATTHEW and AMY JOHNSON, and MARK and KATHERINE SCHOMAKER

Appellants,

VS.

LAKE CUSHMAN MAINTENANCE CO.

Respondents

LAKE CUSHMAN MAINTENANCE CO.'S RESPONSE BRIEF

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#### INTRODUCTION

This case involves rare and unique areas of real property law; a 99-year leasehold estate and an exclusive easement for a community park.

This case comes before this court for review of the trial court's order granting, in part, and denying, in part, Lake Cushman Maintenance Co.'s (LCMC) motion for summary judgment regarding the validity of the exclusive park easement. Appellants seek to invalidate this easement which burdens a portion of their leasehold which has been in existence for over 34 years. Appellants' complaint contained five causes of action: 1) trespass; 2) waste; 3) timber trespass; 4) nuisance and 5) quiet title. (CP 315-327). LCMC filed a counter-claim seeking quiet to the easement and injunctive relief against Appellants. (CP 310-314).

On December 8, 2016, the trial court granted, in part, LCMC motion for summary judgment dismissing the Appellant's claims for trespass, waste, timber trespass and quiet title. The court further granted LCMC's motion to quiet title in the easement and issued an injunction enjoining plaintiffs from asserting any right title or interest in the park easement other than as members of LCMC. The trial court denied LCMC's motion regarding Appellant's nuisance claims. (CP 20-23). Appellants thereafter voluntarily dismissed their nuisance claims under CR 41 on the eve of trial. (CP 17-18).

#### STATEMENT OF CASE

The primary issue in the case involves the validity of an exclusive easement for the park created by the original developer, Lake Cushman Co., in favor of Lake Cushman Maintenance Co. Lake Cushman is a 4,010-acre lake and reservoir on the north fork of the Skokomish River in Mason County. The lake, glacial in origin, was expanded after construction of the Cushman Dam No. 1 by the City of Tacoma. The lake itself is maintained by the dam which provides electrical power to the Tacoma Power system. The City of Tacoma entered into a long term lease with the Lake Cushman Co. in 1966 for the development of a recreational community surrounding the lake. (CP 138). The development originally consisted of 3,074 platted lots. (CP 291 & CP 249-250). Lake Cushman Co. subleases the platted lots to individuals such as Appellants', under similar long term leases. (CP 250) Lake Cushman Maintenance Company is a non-profit corporation and homeowners' association created by Lake Cushman Co. to manage and care for the development's common areas including the Division 14 Park and park easement that encumber Appellants' property. (CP 249). In 2016, 2,298 lessees of the Lake Cushman lots make up the benefited lots having the right to use the park. (CP 292). Each lot can have numerous owners which dramatically

increases the number of individuals authorized by the governing documents to use LCMC recreational facilities. *Id*.

Plaintiffs obtained their leasehold estate by an assignment of lease for Lot 1 of Short Plat 1260 in March 2014. (CP 266). This lot was originally a part of Lot 62, Division 14 of the plat. (CP 275). The original Lot 62 was a large lot retained by Lake Cushman Co. at the time of the original development. Lot 62 bridged the Lake Cushman Resort and the original Division 14 Park located on Lot 61. Prior to 1983, members of LCMC used all of Lot 62 for recreational activities. (CP 285-286). People freely walked between the Lake Cushman Resort and the park located on Lot 61. For a number of years, a trail and boardwalk bridged the Resort and Division 14 Park. Id.

In 1983, Lake Cushman Co. short platted Lot 62 into four smaller lots by Short Plat 1260. (CP 275). Lot 1 of the short plat (Appellants' property) is nearly twice the size of the other three lots but almost half of Lot 1 was "exclusively" dedicated to LCMC to be used for park purposes. (CP 275-282) Id. If you exclude the dedicated park property, Lot 1 is similar in size to the other lots in the short plat. (CP 275) Short Plat 1260 was signed on February 24, 1983 by Lake Cushman Co. <u>id.</u> The Plat map shows the dedication of the park and road easement on its face. <u>Id.</u> On the same date, Lake Cushman Co. also signed a deed granting LCMC an

exclusive easement for park and road purposes over Lot 1 which was recorded prior to the short plat on May 12, 1983, under Auditor's File No. 414987. (CP 274). Short Plat 1260 was recorded on May 13, 1983 under Auditor's File No. 415052, records of Mason County. (CP 274). When Short Plat 1260 was recorded it contained the following language: "Subject to an easement in favor of Lake Cushman Maintenance Co. for road and park purposes, recorded under Auditor's File No. 414987." (CP 279). The plat also stated that the lots were "subject to easements and reservations shown on ... the Short Plat map attached hereto." (CP 280). When plaintiffs acquired Lot 1 they signed the following acknowledgement: "I/We and each of us, Matthew A. Johnson and Amy K. Johnson, husband and wife, and Mark Schomaker and Katherine Schomaker, husband and wife, hereby accept all the terms, covenants, conditions and agreements of the assigned lease . . . . " (CP 268) The "assigned lease" specifically excepted the park and road easements by referencing both the deed and the dedication in the short plat. Id.

Appellants filed this lawsuit in June 2015, primarily seeking to invalidate the park easement. In March 2016, Appellants constructed fences and hedges, posted no-trespassing signs, removed park amenities, and generally interfered with LCMC's lessees use of the park. (CP 289-290, 296, 300-302). On June 13, 2016, the court entered a preliminary

injunction requiring Appellants to remove the obstructions and to stop interfering with the use of the park easement. (CP 190-194).

Appellants devote a substantial portion of their opening brief on the historical use of the easement, nuisance, and a new claim of overburdening the easement. The overburdening claim was not raised as a cause of action in Appellants' complaint. The overburdening arguments have related solely to Appellants' claim of nuisance.

The facts cited by Appellants regarding historical use and nuisance were contested by LCMC and constituted the primary issues of fact reserved for trial. Instead of going to trial on those disputed issues, Appellants elected to dismiss that claim the day before the trial was to begin. Those disputed facts are simply irrelevant to the issues on appeal as they relate solely to Appellants' claim for nuisance (now argued as overburdening). The sole issue on appeal is whether or not a valid exclusive easement for park purposes was granted to LCMC by Lake Cushman Co.

#### **ARGUMENT**

Appellants assign seven errors in this appeal. In order to respond to each of Appellants' claims, LCMC will use Appellants' paragraph numbering appearing in their argument section to respond.

### A. <u>Standard of Review</u>

On review of an order for summary judgment, an appellate court performs the same inquiry as the trial court. City of Tacoma v. Price, 137 Wn.App. 187, 190, 152 P.3d 357 (2007). Therefore, the standard of review is de novo. *Id.* The party that moves for summary judgment bears the initial burden of showing the absence of a genuine issue of material fact, however, if the moving party shows there is no genuine issue for trial, the inquiry shifts to the party opposing summary judgment. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 226, 77 P.2d 182 (1989). If the moving party is a defendant and meets this initial burden, "then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." Id. (quoting Chee Chew v. Lord, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986)). In *Celotex*, the Court explained that where a party fails to prove an essential element of the case, all other facts are rendered immaterial and there can be no genuine issue as to any material fact. *Id.* at 225 (citing *Celotex*, 447 U.S. at 322-23).

### B. Evidence before the trial court: Testimony subject to LCMC's Motion to Strike.

Since this court's review is de novo, the trial court's order striking portions of the declaration of Matt Johnson and Mark Schomaker does not bind the appellate court. "[M]aterials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to be considered on appeal." *Keck v. Collins*, 181 Wash. App. 67, 82, 325 P.3d 306, 313 (2014), aff'd but criticized, 184 Wash. 2d 358, 357 P.3d 1080 (2015).

# 1. <u>Trial court erred in striking portions of the Matt</u> <u>Johnson Declaration.</u>

The trial court made the proper decisions in striking the portions of the declarations, but since this court's review is de novo, this court can consider the relevance and personal knowledge issues raised with the trial court in its review. Matt Johnson offered detailed testimony regarding the number of passes issued by LCMC concluding that has caused use and traffic "well beyond that which was contemplated by the easement." There is no indication in the declaration of Mr. Johnson's personal knowledge of the actual passes issued but, more importantly, what he is offering is actually testimony of what Lake Cushman Company intended in 1983 when it created and granted the easement. Such a statement is pure speculation on Mr. Johnson's part. (CP 48 sentences of paragraph 4

stricken by the trial court). Appellants now state they offered this evidence as relevant on the claims of "overburdening the easement" (Section III A, opening brief of Appellants.). The problem for Appellants is that they did not plead a claim of overburdening of the easement in their causes of action or in their response to summary judgment. The Appellants' claimed only nuisance. The summary judgment issued by the trial court did not dismiss the nuisance claim and there was no overburdening claim to dismiss. Appellants voluntarily dismissed the nuisance claim. (CP 6-8). Those disputed facts regarding use of the park property by strangers are simply not relevant to this appeal.

Mr. Johnson also fails to establish any basis for paragraph 6. He is attempting to offer testimony about what happened to the governance of LCMC in 1991. Mr. Johnson purchased his leasehold in March 2014. Mr. Johnson's statements constitute pure argument of what happened in governance over the years through his interpretation of documents. It is not proper factual testimony.

# 2. <u>Trial court erred in striking portions of the Schomaker Declaration.</u>

The trial court also properly struck paragraph 4 of Mr. Schomaker's declaration. What Mr. Schomaker "feels" is simply irrelevant. (CP 123). The covenants speak for themselves. Mr.

Schomaker's beliefs and opinions in paragraph 6 on payment of taxes is totally irrelevant to the issue of the validity of the original easement.

## C. There are questions of fact regarding the validity of the easement.

Appellants argue in many sections of their brief that the trial court erred in failing to enter findings of fact necessary to its conclusions of law. This argument is without merit. "Findings of fact and conclusions of law are inappropriate on summary judgment." *Oltman v. Holland Am. Line USA, Inc.*, 163 Wash.2d 236, 249 n. 10, 178 P.3d 981 (2008); *Hemenway v. Miller*, 116 Wash.2d 725, 731, 807 P.2d 863 (1991). "Findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court." *Chelan County Deputy Sheriffs' Ass'n v. County of Chelan*, 109 Wash.2d 282, 294 n. 6, 745 P.2d 1 (1987). Appellants' extensive arguments regarding the findings of fact and conclusions of law should be disregarded.

### 1. Lake of authority to grant easement.

Appellants argue Lake Cushman Company lacked authority to grant the easement. This claim is interesting in that Appellants would also be challenging the authority to create the short plat and the easements which grant them access. This court should disregard this argument.

Appellants raise this argument for the first time and on appeal.

RAP 9.12 provides: "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." Where arguments were never presented to the trial court, appellate courts should not consider them when reviewing the summary judgment decision. *Sourakli v. Kyriakos, Inc.*, 144 Wash. App. 501, 509, 182 P.3d 985, 985 (2008);

Coronado v. Orona, 137 Wash.App. 308, 318, 153 P.3d 217 (2007); Bldg. Indus. Ass'n of Washington v. McCarthy, 152 Wash. App. 720, 749, 218 P.3d 196, 210 (2009).

Appellants also misstate the burden of proof. Appellants were required to raise their new "lack of authority" issue in response to LCMC's motion for summary judgment. "Once the moving party has made such a showing, the burden shifts to the nonmoving party to set forth specific facts that rebut the moving party's contentions and show a genuine issue of material fact. (Emphasis added). Zonnebloem LLC v. Blue Bay Holdings, LLC, No. 49308-0-II, 2017 WL 3482580, at 2 (2017). Lack of capacity is an affirmative defense. Johnson v. Perry, 20 Wash. App. 696, 705, 582 P.2d 886, 891 (1978).

Even if the court were to consider this new argument, it lacks merit. The deed of easement itself recites that it was issued "pursuant to

the provisions contained in that certain lease between the City of Tacoma and Lake Cushman Co. dated February 8, 1966 and recorded as instrument #217662..." (CP 151).

Appellants were therefor required to set forth specific facts and bring those facts to the attention of the trial court which rebut the recitation in the deed. They failed to do so. Additionally, Appellants have no right to enforce the lease between Lake Cushman Co. and the City of Tacoma. Assuming, arguendo, that Lake Cushman Co. did not comply with the lease so as to bind the City of Tacoma. Regardless of whether or not the City of Tacoma is bound by the deed and plat, Lake Cushman Co. and its subsequent lessees are bound thereby. Such a deed is not void ab initio as argued by Appellants because Lake Cushman Co. and its successors are still bound. See Nemmer Furniture Co. v. Select Furniture Co., 25 Misc. 2d 895, 900, 208 N.Y.S.2d 51, 57 (1960). In Nemmer, a lessee granted an easement for another lessee for ingress and egress. Nemmer argued that it lacked authority to grant an easement due to their status as a lessee. The court held that where a lessee grants a right in the leasehold estate to a third party, the lessee is bound by their actions as a license for the term of the lease which is enforceable by injunctive relief. See also: Fla. Jur. 2d Easements: "While tenants lack the "fee" necessary to grant an easement such that it would bind the landlord post lease term,

a tenant nevertheless may grant a right of way, provided however that the governing lease does not expressly prohibit such a grant. The effect of such a grant is to establish a license which will terminate upon termination of the leasehold estate. . ."

Only the City of Tacoma has the authority to enforce its lease with Lake Cushman Co., not the Appellants. If Lake Cushman Co. didn't follow the process to grant an easement binding the City of Tacoma, its actions nonetheless bind Appellants as Lake Cushman Company's successor.

### 2. Easement not validly created by Short Plat.

Appellants renew their new argument of lack of capacity in creating the short plat. As discussed in part C (1) above, this court should not consider an argument first raised on appeal. The argument also does not accurately reflect the record. Short Plat 1260 contained the following language: "Subject to an easement in favor of Lake Cushman Maintenance Co. for road and park purposes, recorded under Auditor's File No. 414987." (CP 279). The plat also stated that the lots were "subject to easements and reservations shown on . . . the Short Plat map attached hereto." (CP 280). The park and road easement is clearly shown on the face of the plat map. The map itself establishes the boundaries of the easement labeling it "Esmt. Park – Road." The body of the short plat describes the easement as "easement in favor of Lake Cushman Co. for road and park purposes."

RCW 58.17.165 provides, in part, that: "Any dedication, donation or grant as shown on the face of the plat shall be considered to all intents and purposes, as a quit claim deed to the said donee or donees, grantee or grantees for his, her or their use for the purpose intended by the donors or grantors as aforesaid." "A party may create a private easement by including the grant in a plat under RCW 58.17.165" *M.K.K.I., Inc. v. Krueger*, 135 Wn.App. 647, 653, 145 P.3d 411 (2006), review denied, 161 Wash.2d 1012, 166 P.3d 1217 (2007). No particular words are necessary to create an easement so long as the language used shows an intent to grant with terms that are certain and definite. *McPhaden*, 95 Wash.App. at 435, 975 P.2d 1033. See also *Rainier View Court Homeowners Ass'n, Inc. v. Zenker*, 157 Wash. App. 710, 719–20, 238 P.3d 1217, 1221 (2010).

The case of *Von Meding v. Strahl*, 219 Mich. 598, 609, 30 N.W.2d 363 (1948), relied on by Appellants, has no implications to the facts of this case. In *Von Meding* a stranger to the title was involved. Lake Cushman Company is a lawful lessee of the property with development rights which can bind the landlord. *Von Meding* stands for the proposition that a stranger to the title can never encumber property that they have no interest in. This is inapplicable to Lake Cushman Co.

#### 3. Easement invalid as there is a common grantor/grantee.

Without any citation to authority, Appellants ask this court to disregard the corporate entities of Lake Cushman Co. and LCMC. They argue that the commonality of the directors and members at the time of the

deed of easement invalidates their separate entity status a corporation is entitled to under Washington law.

This court need not consider arguments that are not developed in the briefs for which a party has not cited authority. RAP 10.3(6); *Bercier v. Kiga*, 127 Wn.App. 809, 823, 103 P.3d 232, 239 (2004)(citing *State v. Dennison*, 115 Wash.2d 609, 629, 801 P.2d 193 (1990)); *Collins v. Clark Cty. Fire Dist. No. 5*, 155 Wash. App. 48, 96, 231 P.3d 1211, 1236 (2010).

Washington law does not support Appellants' argument. A corporation exists as an organization distinct from the personality of its shareholders. *State v. Northwest Magnesite Co.*, 28 Wash.2d 1, 182 P.2d 643 (1947). "When the shareholders of a corporation, who are also the corporation's officers and directors, conscientiously keep the affairs of the corporation separate from their personal affairs, and no fraud or manifest injustice is perpetrated upon third-persons who deal with the corporation, the corporation's separate entity should be respected." *Frigidaire Sales Corp. v. Union Properties, Inc.*, 88 Wash.2d 400, 562 P.2d 244 (1977).

Commonality of ownership or governance is not a basis for this court to disregard the separate corporate entities. The case of *Case Credit Corp. v. Stark*, 64 Wash.2d 470, 392 P.2d 215 (1964), is instructive. The facts in *Case Credit Corp* indicated following; (a) one corporation was a wholly owned subsidiary of the other; (b) the secretary-treasurer of one was president of the other; (c) all employees of the subsidiary were paid by the parent corporation; (d) both companies had the same address, credit managers, lawyers, nonresident agents and auditors; and (e) the subsidiary

was in business only to handle retail financing of the parent corporation.

Despite the commonality of ownership and control the court held that these facts were insufficient in themselves to enable a court to disregard the corporate entity and declare the two corporations to be identical.

Washington only recognizes two instances where a court may disregard corporate entities; piercing the corporate veil and the alter ego theory. To pierce the corporate veil, "two separate, essential factors must be established." Dickens v. Alliance Analytical Labs., LLC, 127 Wn.App. 433, 440, 111 P.3d 889 (2005). 'First, the corporate form must be intentionally used to violate or evade a duty." *Dickens*, 127 Wn.App. at 440–41, 111 P.3d 889 (quoting Meisel v. M & N Modern Hydraulic Press Co., 97 Wash.2d 403, 410, 645 P.2d 689 (1982)). "Second, the fact finder must establish that disregarding the corporate veil is necessary and required to prevent an unjustified loss to the injured party." Dickens, 127 Wn.App. at 441, 111 P.3d 889. Piercing the corporate veil is an equitable remedy imposed to rectify an abuse of the corporate privilege. Truckweld Equip. Co. v. Olson, 26 Wash. App. 638, 643, 618 P.2d 1017 (1980). "Typically, the injustice which dictates a piercing of the corporate veil is one involving fraud, misrepresentation, or some form of manipulation" to the entity's benefit and the third party's detriment. Id. at 644-645. Appellants fail to come forth with any facts which indicate an intentional violation duty or the elements of fraud, misrepresentation or any necessity to prevent an unjustified loss to meet the legal requirements of this doctrine. Appellants

do not even hint at any abuse of the corporate privilege which would justify piercing the corporate veil.

The second basis to disregard the corporate entity is under the "alter ego" theory when 'the corporate entity has been disregarded by the principals themselves so that there is such a unity of ownership and interest that the separateness of the corporation has ceased to exist." *Grayson v. Nordic Constr. Co.*, 92 Wash.2d 548, 553, 599 P.2d 1271 (1979) (quoting *Burns v. Norwesco Marine, Inc.*, 13 Wash.App. 414, 418, 535 P.2d 860 (1975)). A corporation's separate legal identity is not lost merely because all of its stock is held by members of a single family or by one person. *Nursing Home Bldg. Corp. v. DeHart*, 13 Wash.App. 489, 535 P.2d 137 (1975). Nor will informality in the operation of a corporation lead to a disregard of the corporate entity if the informality neither prejudices nor misleads the plaintiff." *Roderick Timber Co. v. Willapa Harbor Cedar Prods., Inc.*, 29 Wn.App. 311, 315, 627 P.2d 1352 (1981).

In order for this court to disregard LCC and LCMC's corporate entities, Appellants must produce evidence that there was "such a commingling of property rights or interests as to render it apparent that they are intended to function as one, and, further, to regard them as separate would aid the consummation of a fraud or wrong upon others." *Norhawk Invs., Inc. v. Subway Sandwich Shops, Inc.*, 61 Wn.App. 395, 400–01, 811 P.2d 221 (1991). Appellants fail to meet their burden justifying disregarding the corporation entity.

In reality, there is no commonality. On the day that Lake Cushman Company granted LCMC the exclusive easement 1983, 2,288 families holding lessees became entitled to use this property for a community park. (CP 292 declaration of Julie McGrady). The actual number of benefited individuals is substantially higher. This very purpose of LCMC is to provided community facilities "appropriate for the use and benefit of its members, and lessees". (Emphasis Added) (CP 57, Article II, Section 1). Lake Cushman Co. was operated for the benefit of its shareholders and LCMC was operated for the benefit of the lessees of the Lake Cushman development. (CP 294). There is no commonality in purpose.

# D. <u>Questions of fact as to the meaning and scope of "exclusive" in the Easement.</u>

Appellants ask this court to disregard the clear and unambiguous language of the deed and the nature of the granted easement. The deed states that is an easement for the "exclusive use of the LCMC, its successors and assigns, for park and road purposes." (CP 84). The record establishes that the grantors knew the difference between an exclusive and non-exclusive easement. On the same date as the creation of the exclusive easement, Lake Cushman Company granted LCMC a "non-exclusive" easement for road and utility purposes. (CP 85). At the trial court level, Appellants argued that the intent of the easement was solely to be an

access easement to a boat ramp and view point. (CP 132). This in complete contrast to the clear language exclusive use of the LCMC for park purposes. Appellants now switch arguments to claim the interpretation of the easement should be as a limitation for only LCMC to use the property or limiting the grant to exclusively for road and park purpose.

None of the Appellants' strained interpretations are based upon any admissible facts for a trier of fact to determine. Appellants were required to come forward with admissible facts to demonstrate a contrary intent of Lake Cushman Co. and LCMC 34 years ago when the park easement was created to rebut the clear language of "exclusive use". They fail to set forth any admissible facts as to these parties' intent. This was Appellants burden on summary judgment.

#### 1. Interpretation of deeds.

"[W]here the plain language of a deed is unambiguous, extrinsic evidence will not be considered." *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wash. App. 56, 64–65, 277 P.3d 18, 24 (2012). "This rule is a practical consequence of the permanent nature of real property—unlike a contract for personal services or a sale of goods, the legal effect of a deed will outlast the lifetimes of both grantor and grantee, ensuring that evidence of the circumstances surrounding the

transfer will become both increasingly unreliable and increasingly unobtainable with the passage of time. Accordingly, the language of the written instrument is the best evidence of the intent of the original parties to a deed." Id. at 64–65, 277 P.3d 18, 24 (2012).

If any doubt remains as to the parties' intent, "a deed will be construed against the grantor." *Ray v. King County*, 120 Wn.App. 564, 587 n. 67, 86 P.3d 183 (2004) (quoting 17 William B. Stoebuck, Washington Practice: Real Estate: Property Law§ 7.9, at 463 (1995).

The problem identified by the court in *Newport Yacht Basin Ass'n* is demonstrated in this case. This park easement, being created over 34 years ago, has outlast the lifetimes of both agents of the grantor and of the grantee. Other than the actual documents such as the leases, deed and plat, any evidence of the circumstances surrounding the transfer has become both unreliable and unobtainable. If such evidence existed as to a contrary intent by the parties, Appellants where required to bring it to the trial court's attention

In this case, the language of the written instrument is the best evidence of the intent of the original parties to a deed. Id. at 64–65. This court should interpret the term exclusive against the grantor and therefore Appellants as grantor's successor in interest. *Ray v. King County* 120 Wn.App. at 587 n. 67 (2004).

## 2. <u>Deed is ambiguous with respect to "exclusive" use of the</u> Easement.

Interpreting the deed against Lake Cushman Co. and Appellants, as this court must, results in only one reasonable interpretation, the easement was intended to be exclusive as against the Appellants.

Appellants ask the court for a strained interpretation of the document arguing that the word exclusive should be applied to LCMC use or the word apply to road and park purposes.

The language of the instrument cannot logically be interpreted in this manner. If the word "exclusive" applied to LCMC, the court would have to disregard the words "and its successors and assigns." LCMC is free to assign this easement right to others, so exclusively cannot apply to LCMC. The ability to assign the benefits of an easement third party are extremely rare. Presumably, LCMC could assign the park easement to Mason County to operate as a public park.

Interpreting the language to be exclusively for park purposes make the word "exclusive" unnecessary. Where an easement is limited to a specific purpose, only that purpose and associated uses are authorized. § 2.9 Scope of easements and profits, 17 Wash. Prac., Real Estate § 2.9 (2d ed.) states: "For instance, an easement that began as an easement for utility lines could never become a roadway easement, nor probably could a walkway easement become a motor vehicle easement."

#### 3. Ambiguity as to meaning of "exclusive"

The word "exclusive" is also not ambiguous in this case when applied to an easement for development of a park. Appellants argue that the plain meaning of the word exclusive should be disregarded by the

court in favor of a strained interpretation to benefit the grantor's successor, Appellants. Washington law does not support such an exercise. In *Tacoma Mill Co. v. N. Pac. Ry. Co.*, 89 Wash. 187, 210–11, 154 P. 173, 181 (1916) the court explained: "It is an elementary rule of law that parol evidence cannot be admitted to contradict or vary a written instrument; and it is equally well settled that parol evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were, in fact, so used."

The plain language of the deed states that it is exclusively use by LCMC and its successors and assigns. The word exclusive has a clear definition which is precisely opposite of what Appellants now claim. Exclusive: a: excluding or having power to exclude; b: limiting or limited to possession, control, or use by a single individual or group. Merriam-Webster Dictionary. In this case, "exclusive" means limited possession, control and use by LCMC and its members and lessees to the exclusion of Appellants.

Lake Cushman Co. tied the creation of a community park to the original lease from the City of Tacoma. That lease requires Lake Cushman Company to develop community parks, public parks and enhance recreational opportunities. The preamble of the lease provides for recreational facilities (CP See Exhibit "1" of Declaration of Robert Johnson):

WHEREAS, it is in the best interests of the City of Tacoma that recreational use of existing Cushman project, reservoirs be made available through a lease for private development of individual tracts on or near said reservoirs, and . . .

WHEREAS, the Lessee above named is experienced, competent and financially able to develop it is deemed for such recreational purposes the properties herein described.

Paragraph VIII of the lease provides a follows:

No logging., division, platting, sales or development of the property leased shall be made until the Lessor shall first approve in writing the Lessee's development plans for the next five years, which shall include, but not be limited to . . . community parks, and park areas with access to the waters of the reservoirs which shall be developed and made available to the public . .

Like development plans for each ensuing fiveyear period thereafter shall be submitted to Lessor every five years on the anniversary date of this lease, which plans must likewise be approved by the Lessor in writing...

Failure to comply with or carry out any provision hereinabove set forth shall constitute a violation of this lease and a basis for cancellation thereof by Lessor. . .

(Emphasis added) Just because exclusive easements are not favored in Washington does not mean that they are outlawed. It is generally agreed that an exclusive easement is an 'unusual interest in

land' amounting almost to 'a conveyance of the fee.' Latham v. Garner, 105 Idaho 854, 673 P.2d 1048, 1050 (1983); City of Pasadena v. California–Michigan Land & Water Co., 17 Cal. 2d 576, 110 P.2d 983, 985 (1941). Some courts have refused to recognize such easements, see Latham, 673 P.2d at 1050 n. 1, but most have held that 'parties may agree to create an exclusive easement.' Viebrock v. Gill, 125 Idaho 948, 877 P.2d 919, 923 (1994) (citing Latham). See also MacPherson v. Smoyer, 191 Mont. 53, 622 P.2d 188, 191–92 (1980); Wilkoske v. Warren, 875 P.2d 1256, 1258 (Wyo.1994); Gelfand v. Mortgage Investors of Washington, 453 So.2d 897, 898 (Fla.App.1984); Latham, 673 P.2d at 1051; California–Michigan Land & Water Co., 110 P.2d at 985.

Washington, however, recognizes exclusive easements. As pointed out by Appellants, exclusive easements are most commonly found in cases dealing with condominiums. See *Bogomolov v. Lake Villas Condo. Ass'n of Apartment Owners*, 131 Wash. App. 353, 369, 127 P.3d 762, 770 (2006). They are not limited to condominiums. Other reported Washington cases have discussed exclusive easements. In *Hayward v. Mason*, 54 Wash. 649, 651–52, 104 P. 139, 140 (1909), the court concluded that an instrument granting a right of way for a water ditch was neither the grant of a fee, nor the grant of an exclusive easement. "There is nothing in the deed, or in the circumstances existing at the time it was

made, to indicate that the right of way granted was an exclusive one." Id.

In Hoffman v. Skewis, 35 Wash. App. 673, 676, 668 P.2d 1311, 1314

(1983) the court acknowledged that an exclusive easement may be created by prescription. In Berger v. Comcast of Pennsylvania/Washington/W.

Virginia, LP, No. CV-08-320-LRS, 2011 WL 5038919, at 6 (E.D. Wash.

Oct. 24, 2011), as amended (Oct. 25, 2011) the court noted "An exclusive easement in gross gives the owner the sole privilege of making the uses authorized by it." (Citing the Restatement (First) of Property § 493 (1944)).

Appellants argue that there is an extreme variability of exclusive easements and that Washington rejects the extreme end. The case law does not support this argument. The case law cited by Appellants reflects variability of the dominant estates uses of a non-exclusive easement, not an exclusive one. The fact is that Washington courts have never interpreted a deed that specifically stated it was an exclusive easement. This factual scenario is new to Washington case law. Here we have a grantor that intentionally used the word "exclusive". "An exclusive easement grants unfettered rights to the owner of the easement to use the easement for purposes specified in the grant "to the exclusion of all others," including the servient owner. 7 Thompson on Real Property §

60.04(b)(2). (Thomas ed.1994); 4 Powell on Real Property § 34.02[2][d] (2000).

Even where the word "exclusive" is not used in an instrument, courts have found exclusive easements based upon the nature of the use granted. Exclusive easements are seldom found in ingress and egress easement. But where the use is more intensive, courts have found an create exclusive easement even where the language did not declare is so. In *Rollinwood Homeowners Ass'n, Inc. v. Jarman*, 92 N.C. App. 724, 728, 375 S.E.2d 700, 702 (1989), the easement involved was granted to a homeowner's association for landscaping purposes. The court held that the nature of the easement was such that the servient estate holder could make no use of the easement, even though the reservation did not declare it to be exclusive. "We hold that this evidence was sufficient to support the trial court's conclusion that the easement was an exclusive easement, solely and exclusively owned by plaintiff."

Blackmore v. Powell, 150 Cal. App. 4th 1593, 1600, 59 Cal. Rptr. 3d 527, 532–33 (2007), is another case where the grant of easement itself did not say it was exclusive but the trial court found an exclusive easement. The case involved an easement for a garage. The servient owner objected to the ruling, arguing that it abrogated his rights over that portion of the easement. The court of appeal rejected this contention,

reasoning that the award of exclusive control was necessary to protect the easement holder's rights.

In this case the instrument defines the easement as exclusive and grants a use where exclusivity is necessary to protect the easement holder. In *McNamara v. Ferraz, No. 15 MISC 000048 HPS*, 2015 WL 4937897, at 3 (Mass. Land Ct. Aug. 19, 2015), aff'd, 89 Mass. App. Ct. 1135, 55 N.E.3d 433 (2016), review denied, 476 Mass. 1103, 63 N.E.3d 387 (2016) the court interpreted an exclusive easement for a patio and parking space. "Giving the word "exclusive", its ordinary meaning, as used in these two grants of exclusive use easements to the plaintiffs as owners of Unit 1E, the court finds and rules that Ms. Ferraz does not have a right to cross, access or use the plaintiffs' parking spaces or the patio appurtenant to their unit for any purpose."

An exclusive easement makes common sense when you consider the use or purpose of the easement is for a park. Would it be reasonable to allow Appellants to use the park property for inconsistent uses? LCMC has the legal right and probably an obligation given the master lease to develop the entire park easement to provide recreational opportunities to the several thousand lessees. That development may include swing sets, horseshoe pits, volley ball courts, nature trails, restroom facilities, basketball courts or any number of recreational opportunities found in

parks. To allow Appellants to block access, construct improvements, restrict cutting trees or prohibit development of park amenities would substantially interfere with a park. Appellants use of the park property for any purpose other than using the park as a member community would substantially interfere with this easement.

It is clear from the language used by Lake Cushman Co. that an exclusive easement was intended. Considering the potential uses of a community park in the future, the nature of the easement makes exclusivity necessary.

### 4. Easements excluding use of servient owners inconsistent with Washington law.

Appellant contends that an exclusive easement is inconsistent with Washington law. This bold statement is made without any citation to authority. Washington authority in contrary to this statement. In *Hayward v. Mason*, 54 Wash. 649, 652, 104 P. 139 (1909), the court held: "Thus, **unless an easement is exclusive**, the rule is that the owner of the servient estate may use his property as he chooses, so long as his use is consistent with enjoyment of the easement." (Emphasis added). Other than *Hayward*, there are currently no Washington cases that have examined exclusive easements. The cases cited by Appellants for the proposition that a dominant owner continues to have use of the easement

property are all relating to non-exclusive easements. Those cases are simply not applicable to an exclusive easement as presented here.

# 5. Intent is a question of fact: did Lake Cushman Company intend to functionally divide the Property as if the Easement were a separate parcel?

Appellants argue that every deed must turn on a review of extrinsic evidence to determine original parties' intent, in this case over 34 years ago. This is not the law. In Washington, the court will resort to extrinsic evidence only in cases where there is an ambiguity. "[W]here the plain language of a deed is unambiguous, extrinsic evidence will not be considered." *Newport Yacht Basin Ass'n of Condo. Owners at* 64–65 (2012).

Appellants attempt to shift the burden by arguing that LCMC was required to submit testimony of the grantor to determine intent.

(Appellants' Opening Brief paged 46). For summary judgment, LCMC produced the language of the written instrument which states it is "exclusive" which "is the best evidence of the intent of the original parties to a deed." *Id.* To the contrary, it was Appellants that were required to come forward with admissible evidence of a contrary intent, which they failed to do.

Appellants cannot resist summary judgment by claiming some unknown extrinsic evidence, which presumably will be produce at trial, will change the interpretation of the term "exclusive". CR 56 required Appellants to produce that evidence to the trial court to demonstrate a

triable issue of fact. Simply claiming that they there is extrinsic evidence for a future trial is insufficient to survive summary judgment.

Appellants also find fault with a lack of findings of fact and conclusions of law again. As previously established, findings of fact and conclusions of law in review of a summary judgment action are superfluous.

Appellants claim that if Lake Cushman Co. wanted property for exclusive use they would have carved out the piece of land and not written an easement over it. This argument ignores Washington subdivision law. Lake Cushman Company was prohibited from dividing off the park property by virtue of the short plat process they utilized under RCW 58.17.060. A short subdivision allows only the creation of four or fewer lots. RCW 58.17.020. Lake Cushman Co. could not have used the short plat process to create a separate park parcel.

# E. Trial court failed to define "park and road purposes" as necessary with respect to determining validity and scope of Easement. (Assignment of Error No. 4)

Appellants cite *Littlefair v. Schulze*, 169 Wn. App. 659, 665 (2012), for the proposition that a court cannot determine whether the use of the property is reasonable until there is a determination of the underlying facts as to the particular use of the easement. (Appellants' opening brief page 48). *Littlefair* does not support Appellants' position.

In *Littlefair*, the trial court ignored the clear language creating a 40-foot-wide non-exclusive easement and instead looked to the historical use by the parties. *Littlefair* argued that the trial court erred in finding that road was intended to be a one-way roadway of 12 to 14 feet in width because of its historical use. *Id. at* 664. The Court of Appeals agreed with *Littlefair* and reversed. The court held "[w]e interpret an easement as a mixed question of law and fact. The intent of the party who created the easement is a question of fact, whereas the legal consequence of that intent is a question of law. To determine the parties' original intent, we look to the conveying instrument as a whole. If the plain language of the conveyance is unambiguous, we will not look beyond that language." (Internal citations omitted). The court stated that where the instrument clearly showed a 40 easement, it was an error to look at historical use to contradict the writing. *Id.* at 665.

- F. Trial court erred in quieting title in the Easement to LCMC to the exclusion of any use of Johnson and Schomaker as leaseholders, and issuing an injunction as to any such future use. (Assignment of Error No. 7).
  - 1. Cannot quiet title until resolution of material facts on scope of Easement.

Appellants misstates the standard of review. This court's review is de novo and not the abuse of discretion standard referenced by Appellants. discussed.

In this section of their briefing, Appellants again claim that material facts exist on the scope of the easement without disclosing what those contested facts are. The documents speak for themselves and Appellants have failed to bring forth any contested facts for a trier of fact to resolve.

### 2. LCMC did not seek a permanent injunction.

Appellants claim that LCMC did not seek an injunction. This is yet another claim that was not raised in the trial court and should not be considered. RAP 9.12 It is also meritless. LCMC's sole cause of action was for quiet title with a permanent injunction. Paragraph 3.10 of LCMC's counterclaim states "Defendant is without adequate remedy at law and therefore seeks and are entitled to a decree quieting title in and to the property described in paragraph 2.1 either in exclusive easement or fee title and an injunction, permanently prohibiting plaintiffs from interfering with defendant's and its members, quiet and peaceful enjoyment of the property. In the prayer for relief, LCMC requested "a decree of this court adjudging Defendant to be the owner of real property described in paragraph 2.1 in fee or exclusive easement, quieting its title thereto and barring plaintiffs and each of them from asserting any interest therein superior to the title of Defendant other than those admitted herein. Clearly, LCMC was seeking injunctive relief. A preliminary injunction

has already been issued by the trial court at the time of the summary judgment hearing. Appellants never complained that the preliminary injunction was not appropriate.

### 3. <u>Injunction can only address unreasonable interference</u>, which is a question of fact.

Appellants argue that what uses a servient owner may make on an easement depends on the parties' intent as viewed through historical use citing *Evich v. Kovacevich*, 33 Wash. 2d 151, 204 P.2d 839, (1949). *Evich* involved the establishment of an easement by implication. One element of establishing an easement by implication is by use. By definition, an easement by implication does not have any written grant or instrument for the court to review. Easements by implication require the court to examine the historic conduct of the parties to determine a scope since no written instrument exists. *Id.* at 157. The analysis in *Littlefair* should apply to easements created by deed and not use. *Littelfair*, 169 Wn. App. at 665 (2012).

Thompson v. Smith, 59 Wash. 2d 397, 409, 367 P.2d 798, 804 (1962), also cited by Appellants, involved a non-exclusive easement established by prescription and reservation. Prescriptive easements are established by use not deed. A court must review historic use to establish such and easement.

they were required to plead such causes of action in response to LCMC's quiet title action. CR 13 makes it compulsory that a pleading state, as a counterclaim, "any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." The failure to plead a compulsory counterclaim will bar a subsequent action on that claim. Schoeman v. New York Life Lns. Co., 106 Wn.2d 855, 863, 726 P.2d 1 (1986); Chee Chew v. Lord, 143 Wn.App. 807, 814, 181 P.3d 25 (2008).

Appellants did not claim any legal or equitable right to maintain any improvements in the park easement. Any such claim is now barred under CR 13 and res judicata. In addition, claims of adverse possession of green space such as community parks is prohibited by RCW 36.70A.165.

### G. Questions of fact regarding trespass, timber trespass and waste; lack of findings.

Appellants again discuss findings of fact and conclusions of law which are not required in granting of summary judgment. *Chelan County Deputy Sheriffs' Ass'n v. County of Chelan*, 109 Wash.2d at 294 n. 6 (1987).

Case law interpreting non-exclusive easements and what uses a servient owner may make of them do not apply in an exclusive easement case. The deed in this case clearly defines the intended use: "an easement for the **exclusive use of** Lake Cushman Maintenance Co. . . for park purposes" (CP 151)(Emphasis added). If the use was to be non-exclusive as to Appellants, the deed would have reflected that intent. Exclusive use means to the exclusion of Appellants.

### 4. Claim of injunction is not ripe

Summary judgement is appropriate where the "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56. The pleadings on file include the motion for preliminary injunction and its supporting declarations leading to the order granting preliminary injunction. (CP 190- 309). Interference by Appellants was clearly established.

Appellants argue that an old fence fence and storage shed that encroach onto the easement area to show no interference with the park easement. At this point, any encroachments from Appellants' onto the easement can only be viewed as permissive. If Appellants contend that they have some legal or equitable right for existence of encroachments,

As to timber trespass; Appellants never put forth any evidence that the owned the tree that was cut. This is an essential element of a timber trespass claim. As pointed out in *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d at 226 (1989), if the moving party is a defendant "then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." Ownership of the timber is an essential element of any timber trespass claim. Appellants failed to provide any admissible evidence that they owned the tree that was cut.

A lease is a right of exclusive use and does not convey title to timber standing on the property. See *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wash. App. 1, 970 P.2d 343 (1999), as amended on reconsideration in part (Aug. 25, 1999). The record before the trial court established that the trees are owned by the lessor, the City of Tacoma. (CP 145). The lease only grants permission to Lake Cushman Co. to cut the trees with permission of the City. Appellants did not attempt to establish title to the trees. The only evidence they produced was a self-serving statement by Mr. Johnson that he paid taxes on the trees. (CP 51).

Appellants claims of trespass were based upon the argument that there is no valid easement. Where LCMC, its successors and assigns, has an exclusive easement for park purposes easement, there can be no trespass. In addition, in response to LCMC's motion for summary judgment, Appellants only complained of trespassing by third parties, not members of LCMC. (CP 51). Mark Johnson stated "[if] the easement is valid we are not trying to prohibit that use." And also "[w]e posted no trespassing signed (which made sense as the LCMC members who could use it had permission and were not trespasser). We were simply trying to minimize the nefarious."

Appellants evidence of waste was also missing from their responsive pleadings. They waste complained of was through actions of third parties. Summary judgment on these claims was therefore appropriate.

## H. <u>Trial court did not have authority to issue an injunction against future legal claims.</u>

Quiet title is equitable action. *Kobza v. Tripp*, 105 Wash. App. 90, 95, 18 P.3d 621, 623 (2001). As an equitable action and equitable remedy such as an injunction is appropriate. "Another and more colorful way of stating the same proposition is that 'the object of the statute is to authorize proceedings 'for the purpose of stopping the mouth of a person who has

asserted or who is asserting a claim to the plaintiff's property." *Kobza v. Tripp*, 105 Wash. App. 90, 95, 18 P.3d 621, 624 (2001). The only way to stop the mouths of Appellants' is through an injunction.

As set forth in § 11.10.Remedies—Specific relief, 18 Wash. Prac., Real Estate § 11.10 (2d ed.): "In a quiet title action, specific relief is in the form of an order declaring the state of title. Quiet title developed in equity, which has always given specific relief—injunctions are the most familiar example—as its usual form of relief."

The court did not prohibit Appellants from filing future lawsuits but did forever barred Appellants from asserting an adverse claim to the park easement property adverse to LCMC's title. Another lawsuit on the issue of title is prevented by res judicata.

#### CONCLUSION

Appellants seek to invalidate a community park benefiting over thousands of lessees and their families which has been in existence for over 34 years. Appellants wants a trial, but fail to disclose what their contested facts consists of. The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue of material fact. *Jacobsen v. State*, 89 Wash. 2d 104, 108, 569 P.2d 1152, 1155 (1977). Appellants' obligation was to disclose specific contested facts that are material which a trier of fact can resolve. This requires them

to produce admissible facts that support their claims. While Appellants do raise facts associated with their nuisance claim (now sometimes referred to as overburdening) but produce no facts relevant to the issue on appeal. Specific fact that show an intent contrary to the deed declaring an exclusive where necessary. The trial court did not dismiss their claim of nuisance which is the basis for almost all their complaints, Appellants voluntarily abandoned those claims. Respondents request that this Court affirm the decision of the trial court.

Dated August 31, 2017

Robert W. Johnson, WSBA No. 15486

Attorney for Lake Cushman Maintenance Co..

### ROBERT W. JOHNSON P.L.L.C.

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